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No.

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

SOPHIE STARZENSKI, KAZMER STARZENSKI and GENNIE STARZENSKI,

Petitioners,

vs.

CITY OF ELKHART, RICHARD L. MOORE, STREET COMMISSIONER, RAYMOND H. MINEGAR, CODE ENFORCEMENT OFFICER AND PRESIDENT, LEROY BERRY, JR., CITY OF ELKHART HEARING OFFICER and HEALTH AND SANITATION COMMISSION,

Respondents.

Petition for Writ of Certiorari to the Indiana Court of Appeals

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. COHEN
Counsel of Record
Attorney for Petitioners
221 West Lexington Avenue
Elkhart, Indiana 46516
(219) 293-4511

9461
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

56 PP

QUESTIONS PRESENTED:

1. Whether the minimum constitutional requirements for a search and seizure of personal property in a private home were met when the Respondent, City of Elkhart, entered the Petitioner's home to abate a nuisance without a judicial warrant but pursuant to an administrative order.

2. Whether the Respondent's actions in entering the Petitioner's home and seizing personal property violated due process and was an unconstitutional taking under the Fifth Amendment.

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JURISDICTION AND OPINIONS BELOW

Petitioners, Sophie Starzenski, Kazmer Starzenski and Genie Starzenski (hereinafter referred to as the "homeowners"), appeal the decision of the Indiana Court of Appeals dated January 10, 1996. The decision by the Indiana Court of Appeals is reported at 659 N.E.2d 1132 (hereinafter referred to as the "Indiana decision"). The homeowners filed a Petition to Transfer to the Indiana Supreme Court on February 7, 1996. The Petition to Transfer was denied on May 31, 1996.

This appeal is being docketed in this Court within ninety (90) days of the denial of transfer by the Indiana Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1257, 28 U.S.C. 2101(c) and 28 U.S.C. 2104.

UNITED STATES CONSTITUTION

This case involves the Fourth, Fifth and Fourteenth Amendments of the United States Constitution.

The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects,

against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment Provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment Provides that:

> *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPLICABLE STATE STATUTES

The Indiana statutes applicable to this case are found in Indiana Statutes I.C. §§ 35-7-9-1 et seq. and 36-7-9-16.

STATEMENT OF THE CASE

This was an action for injunctive and declaratory relief. Sophie Starzenski, Kazmer Starzenski and Gennie Starzenski are the owners as tenants in common of 1015 West Garfield, Elkhart, Indiana (hereinafter referred to as "the property"). On February 8, 1993, the Respondent-Defendant, City of Elkhart, entered the property and began to clean out the inside of the home. The same day, Petitioners filed a Petition for Temporary Restraining Order alleging that the Fourth Amendment required a judicial warrant before the City could enter the property. The homeowners contend the warrantless entry and seizure of their personal effects violated the Fourth and Fifth Amendments.

The trial court found that a warrant was not required under the Fourth Amendment before the City entered Petitioners' house. The trial court further found no violation of Due

Process. The Court of Appeals of Indiana affirmed the trial court and the Indiana Supreme Court denied transfer.

On October 29, 1992 an administrative hearing was held in connection with the clean up of the property. The home-owner appeared in person for the October 29th hearing and protested, on Fourth Amendment grounds, the City's right to enter her house.

The hearing authority declared the home a nuisance and gave Petitioners fifteen (15) days to bring the property into compliance with the order or the City would enter her home to abate the nuisance. In response to the order, in December, 1992, the homeowners cleaned up the outside of the home.

The City failed to notify the homeowners of a further administrative hearing on February 3, 1993, before the Health and Sanitation Commission. At this meeting, the Health and Sanitation Commission voted to go ahead with a clean up of the inside of property. The City hand-delivered notice of its intent to enter and clean up the inside of the property to the

Petitioner-homeowner, at 1015 West Garfield. Sophie Starzenski got this notice on Friday, February 5th, after the City Offices were closed.

On February 8, 1993, without a judicial warrant or writing of any kind, the City broke into the home and began removing all of the personal effects. When Petitioner, Sophie Starzenski arrived, she was arrested. The charges were subsequently dismissed.

The homeowners maintain that the Administrative Enforcement Authority's October, 1992 administrative order could not have served as a valid warrant for the search and seizure of Petitioners' property in February, 1993. Petitioners further contend that the City's seizure of their personal effects violated due process and was an unconstitutional taking by the government.

CONSTITUTIONAL ISSUE FIRST RAISED

At the October 29, 1992 administrative hearing, the homeowners raised the Fourth Amendment issue. In the trial court, Petitioner first presented the 4th Amendment, Due Process and Takings Clause issues.

FOURTH AMENDMENT VIOLATION

The Indiana decision ignores several cases from this Court which, when read together, clearly mandate that a judicial warrant is required before the City could enter a private residence.

Soldal v. Cook County, IL, 506 U.S. 56 (1992), stands for the proposition that the Fourth Amendment covers seizures of property by the government.

As this Court articulated in *Soldal*:

> A "seizure" of property, we have explained, occurs when "there is some meaningful interference with an individual's possessory interests in that property." In addition, we have emphasized that "at the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home."...As a result of the state

> action in this case, the Soldal's domicile was not only seized, it literally was carried away, giving new meaning to the term "mobile home". We fail to see how being unceremoniously dispossessed of one's home in the manner alleged to have occurred here can be viewed as anything but a seizure invoking the protection of the Fourth Amendment.

(Citations omitted) 506 U.S. 56 at 61.

The Indiana decision in this case is in direct conflict with this Court's decision in *Soldal*. Based upon *Soldal*, the City violated the Fifth and Fourteenth Amendments of the United States Constitution when it removed from Petitioners' home personal effects like money, family photographs, books, personal papers, a certificate of deposit and Sophie Starzenski's Army discharge papers, all without compensation.

In *Payton v. New York*, 445 U.S. 573 (1980), this Court made it clear that a judicial warrant must be obtained before entering a private residence.

This Court held in *Payton* that "[t]he basic principle of Fourth Amendment law that searches and seizures inside a

home without a warrant are presumptively unreasonable... the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant". Id. at 590.

In *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967), this Court held that the Fourth Amendment applies to administrative search and seizures by Health and Safety code inspectors.

In *Camara*, this Court held that administrative searches by municipal health and safety officers constituted significant intrusions upon interests protected by the Fourth Amendment, and therefore a judicial warrant would be required before entering a private home.

> One governing principal, justified by history and current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant. (citations omitted) ...'The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a

> society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.'

Id. at 529.

This Court stated in *Camara* the right to be secure in one's home is paramount.

> ...[e]ven the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security.

Id. at 531.

This Court in *Camara* clearly concluded that, before health and safety officers can be admitted into one's home, a warrant must be obtained. The Indiana decision in this case conflicts with this Court's decision in *Camara*.

In this case, the City entered the homeowners' property based upon an order by an administrative "hearing authority"

issued months earlier. However, this authority was not a "neutral and detached magistrate" as defined by this Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). In *Coolidge*, this Court invalidated a warrant issued by the State Attorney General because as an executive officer he lacked the impartial judgment required to decide whether a search warrant should be issued. In the case at bar, the "enforcement authority" and the "hearing authority" were both appointed administrative officials of the Health and Sanitation Commission. Therefore, an order issued by the former and later affirmed by the latter could not substitute for a judicial warrant because it was not issued or reviewed by a "neutral and detached magistrate" as required by *Coolidge*.

This Court should grant certiorari in this case not only to correct this error, but also to resolve the conflict among the states relative to the proper application of the Constitutional principals in these type of cases. Homeowners across America, and especially in Elkhart, Indiana, are at risk for the same kind

of government intrusion suffered by the Petitioners in this case. Public nuisance law is embodied in the common law and is highly regulated among the states. However, the states are in conflict as to how government authorities may proceed to abate public nuisances.

While the Indiana Court of Appeals found no constitutional violations in this case, the outcome would have been different in California. A divided Ninth Circuit held in *Conner v. City of Santa Ana*, 897 F.2d 1487 (9th Cir. 1990), that the Fourth Amendment was violated by a warrantless entry to seize junk cars to abate a public nuisance under the authority of a city council order.

Reaching the opposite result of the Ninth Circuit, the Eighth Circuit held that *Soldal* permitted the destruction of a private building to abate a nuisance without a warrant as long as the owner had "fair notice" that the City intended to condemn the building. *Hroch v. Omaha*, 4 F.3d 693 (8th Cir. 1993).

In contrast to Indiana and the Eighth Circuit Court in *Hroch*, the Iowa Supreme Court held that a search warrant was required to enter private property before seizing personal property to abate a nuisance. *City of Cedar Falls v. Flett*, 330 N.W.2d 251 (Iowa 1983).

And unlike Indiana in this case, the Ohio Supreme Court held that Ohio law "expressly requires that the existence of a nuisance be admitted or established in a judicial proceeding prior to the confiscation and sale of personal property". *State Ex. Rel. Miller v. Anthony*, 647 N.E.2d 1368 (Ohio 1995).

Georgia law is in opposition to the Indiana decision in this case, but is in conformity to the Ninth Circuit in *Conner v. City of Santa Ana*, *supra*. The Georgia Supreme Court has held that a warrant issued by a neutral and detached magistrate based upon probable cause be applied to actions to abate public nuisances. *Carson v. State*, 144 S.E.2d 384 (1965).

Often authority to take action against homeowners like Sophie is taken from ambiguous state statutes originally

intended to control the use of property in criminal cases. It is imperative that this Court act to preserve the Fourth Amendment and clarify its recent rulings on this subject by granting certiorari in this case to resolve the conflicts among the states and federal circuits.

DUE PROCESS VIOLATION

In this case, the seizure of the homeowners' property implicates both the Fourth Amendment and the Fifth Amendment, as well as the Fourteenth Amendment. The Indiana Court of Appeals has found that the City's actions in this case did not violate the Due Process clause of the United States Constitution. 659 N.E.2d 1132. That decision violates this Court's precedent.

Once the City entered the residence, its actions in arbitrarily seizing the homeowners' personal property violated the Due Process clause of the Fifth and Fourteenth Amendments. The City allowed workers to rake much of the property out of the residence without ever examining the contents.

There was no training whatsoever for any City employees to determine what should be saved and what should be thrown out. This decision was left to the unfettered discretion of these untrained City employees, a scenario which was condemned by this Court in *Camara*. Several items of value, such as Sophie Starzenski's military discharge papers and currency were later recovered by the homeowner among the items thrown out by City workers. At the time of clean up, Sophie Starzenski requested that the City workers produce a search warrant and to stop for a moment to allow her to enter her home to save family pictures. Both requests were denied. As the trial court determined, the City's actions were "calculated to deprive the Plaintiff [homeowner] of notice and the opportunity to be present during the clean up". These actions violate the Fourth Amendment and the Due Process clause of the Fifth and Fourteenth Amendments of the United States Constitution.

The homeowners were entitled to a predeprivation hearing concerning what items should be seized. However,

when the Health and Sanitation Department met on February 3, 1993 to discuss this matter, no notice was sent to any of the homeowners. *Sinermon v. Burch*, 494 U.S. 113 (1990). Meaningful notice under Due Process requires that notice be given which is reasonably calculated to inform someone that the government is about to act. *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). In this case, the City disregarded these fundamental Due Process requirements of notice and a predeprivation hearing. The City's actions contravene this Court's decisions in *Mennonite* and *Sinermon*.

CONCLUSION

In light of the foregoing Due Process transgressions and because of the violation of the Fourth Amendment, this Court

should grant certiorari and reverse the decision of the Indiana Court of Appeals.

Respectfully submitted,

WILLIAM J. COHEN (3291-20)
Attorney for Petitioners
221 West Lexington Avenue
Elkhart, IN 46516
219/293-4511

APPENDIX A — DENIAL OF PETITION TO TRANSFER DATED MAY 31, 1996

STATE of INDIANA

217 STATE HOUSE
INDIANAPOLIS, IND 46204
(317) 232-1930
FAX (317) 232-8365

Cause Number
20A05-9502-CV-00056
Lower Court Number:
20D029302CP107

H. JOHN OKESON
CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

WILLIAM COHEN
221 WEST LEXINGTON AVENUE
ELKHART, IN 46516

Fax Number: 219-522-6281

STARZENSKI, SOPHIE - V- ELKHART, CITY OF, ETAL

You are hereby notified that the SUPREME COURT has on this 5/31/96 APPELLANT'S PETITION FOR TRANSFER IS HEREBY DENIED.

RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR AA

WITNESS my name and the seal of said Court,
this __ ST day of MAY, 1996

s/ H. John Theson
Clerk Supreme Court, Court of Appeals and Tax Court

APPENDIX B — OPINION OF THE COURT OF APPEALS OF INDIANA DATED JANUARY 10, 1996

Sophie STARZENSKI, Kazmer Starzenski, and Gennie Starzenski,

Appellants-Plaintiffs,

v.

CITY OF ELKHART, Richard L. Moore, Street Commissioner, Raymond H. Minegar, Code Enforcement Officer and President, Leroy Berry, Jr., City of Elkhart Hearing Officer, and Health and Sanitation Commission,

Appellees-Defendants.

No. 20A05-9502-CV-56.

Court of Appeals of Indiana.

Jan. 10, 1996.

* * *

William J. Cohen, Elkhart, for Appellants.

Paul D. Eash, Elkhart City Attorney, Elkhart, for Appellees.

OPINION

BARTEAU, Judge.

Sophie Starzenski, Kazmer Starzenski and Gennie

Appendix B

Starzenski appeal from the trial court's order denying the Starzenskis's request for a preliminary injunction against the City of Elkhart (hereinafter, "the City"), which removed trash and debris from the Starzenskis's property. We heard oral argument on November 27, 1995, at the Valparaiso University School of Law.

ISSUES

We consolidate and restate the issues raised on appeal as:

(1) Whether the Starzenskis may attack an order issued under Ind.Code 36-7-9-5 and affirmed under I.C. 36-7-9-7 in a collateral proceeding.

(2) Whether the City's action in entering the Starzenskis's property and removing trash and debris violated the Starzenskis's Due Process rights under the Fourth and Fourteenth Amendments to the United States Constitution.

(3) Whether the City's action in entering the Starzenskis's property and removing trash and debris violated the Starzenskis's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

(4) Whether the order under which the City entered the Starzenskis's property and removed trash and debris was unenforceable because it was "too stale."

Appendix B

FACTS

Sophie, Kazmer and Gennie Starzenski own real estate located at 1015 West Garfield in Elkhart, Indiana. Sophie describes herself in her Brief as a "bag lady" who resides in Elkhart.[1] Kazmer and Gennie do not live in Elkhart.[2]

In 1991, the Building Commissioner and Enforcement Authority (hereinafter, "Enforcement Authority")[3] of the City of Elkhart determined that the Starzenskis's property was in violation of I.C. 36-7-9, *et seq.*, and City of Elkhart Ordinance No. 3897, due to a large accumulation of trash and debris on the premises. The Enforcement Authority ordered that the property be cleaned,[4] and a hearing on the matter was set for July 24,

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1. There is a house on the property at 1015 West Garfield, although the City and the Starzenskis dispute how the property is used. Sophie claims that she lives in the house at that location as her primary residence. The City, however, disputes this contention and points to the fact that there has been no water or gas service to the house for many years. For the purpose of this decision, we presume that the house is Sophie's home.

2. Throughout the proceedings before the Building Commissioner and Enforcement Authority of the City of Elkhart, Sophie and the City could only identify the last known address of Kazmer as being in Antarctica, and the address of Gennie as being in New York. It was not until this matter was brought before the Elkhart Superior Court that Kazmer and Gennie informed the City that their current address is in Sequim, Washington.

3. Indiana Code 36-7-9-2 defines "enforcement authority" as the chief administrative officer of the department authorized by ordinance to administer I.C. 36-7-9, *et seq.*, which governs the enforcement of building standards.

4. Indiana Code 36-7-9-5(a)(4) authorizes the Enforcement Authority to issue an order requiring "removal of trash, debris, or fire hazardous material in and about the unsafe premises."

1991.[5] In accordance with I.C. 36-7-9-25, notice of the hearing was sent to, and received by, Sophie at the 1015 West Garfield address. Notices also were sent to Kazmer and Gennie at their Antarctica and New York addresses, but the notices were returned undelivered. Notice was also published in the local newspaper, *The Elkhart Truth*, Sophie appeared at the hearing.

At the July 24, 1991 hearing, the City offered photographs and testimony concerning the condition of the property. At the conclusion of the hearing, the Hearing Authority[6] determined that the property was in substantial violation of the building code, was unsafe, unclean and constituted a nuisance. Supp. R. 665-67. The Hearing Authority affirmed the Enforcement Authority's order, and sent a written "order" to Sophie instructing the Starzenskis to remove "junk and debris" from the property within 30 days, after which time the City was authorized to enter the property and take the required action.

The 30-day time period came and went without the Starzenskis taking any substantial action to ameliorate the problem. By September, 1992, the Starzenskis had not complied with the order, and in fact additional debris had collected on the property. At that time, the exterior of the property was filled with trash, debris and flammable materials. As visible through windows and doors, the house was "jam packed" with debris and garbage.

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5. Indiana Code 36-7-9-7, with unrelated exceptions, requires a hearing be held relative to each order of the Enforcement Authority.

6. Indiana Code 36-7-9-2 defines "hearing authority" as a person or persons designated as such by the executive of a city or county, or by the legislative body of a town.

Appendix B

The Enforcement Authority again determined that the house and premises were unsafe, and on September 23, 1992 executed a "Notice — Order to Take Action." Supp.R. 783-84. The Order to Take Action was sent to Sophie, who signed a return receipt upon receiving it. Notices of the Order to Take Action were also sent to Kazmer and Gennie, but were returned undelivered. The City also published the Order to Take Action required the removal of trash from the entire premises within 10 days, and stated:

> If you do not comply with this order, the City of Elkhart, through its Building Department, may enter the premises and carry out the action required by the order and charge you for the costs of said clean up.

Supp.R. 784. Notice of a hearing was sent to, and received by, Sophie. Again, notices were sent to Kazmer and Gennie but were returned undelivered. The second hearing was held on October 29, 1992.

Sophie appeared at the second hearing, offered evidence, cross-examined witnesses and presented argument. Inspectors testified and offered photographs of the property, describing the premises, inside and out, as containing a large amount of debris and trash.[7] Also offered into evidence was a September 24, 1992, police report, completed when Sophie reported that the house had been burglarized, in which the investigating officer stated

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7. There is no evidence that inspectors actually entered the residence on the property. The Record shows that the inspectors determined that the house on the property was packed with debris from seeing trash piled up in the windows.

that there was no way to enter the house due to piles of materials stacked to the ceiling. The police officer reported that "[t]he residence was jammed full, [including] the basement of everything imaginable. . . ." Supp.R. at 705-06.[8]

The Hearing Authority again found that the residence was a nuisance, and again affirmed the order of the Enforcement Authority that "substantial stuff and things" [9] be removed from the premises. Supp.R. 721-24. The Hearing Authority specifically instructed Sophie to bring the property into compliance within 15 days, after which the City was authorized to enter the property, inside and out, and take the necessary action. Supp.R. 722-24. The Hearing Authority also expressly notified Sophie of her right to appeal to the Circuit or Superior Court, and told her that she must appeal his decision within 10 days. Supp.R. 703, 724. Sophie did not appeal.

Again, the Starzenskis did not comply with the order within the time allotted. The City sent notice of its intent to enter and clean the property to Sophie at the 1015 Garfield address on February 4, 1993. Sophie received this notice on February 5. The City entered the property on February 8, 1993, to remove debris and clean. The City found the yard, house, shed and garage packed with trash. The house was filled with debris, in some places five feet deep, which completely covered the floor. The

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8. The police officer did not enter the residence, as the door was blocked by debris. The police report reflects that Sophie had to enter the house by crawling through a window to see if anything had been stolen.

9. Evidently, the Hearing Authority chose to refer to the debris within and about the house as "substantial stuff and things" because Sophie objected to the characterization of the material in her house as being trash. Supp.R. 709-710.

basement also was packed with trash, at some points as high as the ceiling.

The City's workers separated and removed the trash, while items that appeared to be of value were retained in areas of the house that the workers had cleared away. These items remained in Sophie's possession. The debris removed from the residence filled eight dump trucks and was taken to a landfill.

While the City's workers cleared the debris, the Starzenskis's attorney petitioned for, and was awarded, a temporary restraining order that stopped the trash removal. The temporary restraining order was presented to the City workers and prevented the workers from clearing the refuse from the Starzenskis's basement. In later seeking a preliminary injunction, the Starzenskis argued that the City violated their Due Process rights by entering their property without a warrant, and that the City had taken their possessions without just compensation. After a hearing, the trial court denied their request for a preliminary injunction, finding that the City's actions did not violate the Constitution.

COLLATERAL ATTACK

Indiana Code 36-7-9-8 states, in part:

> (a) An action taken under section 7(d) of this chapter is subject to review by the circuit or superior court of the county in which the unsafe premises are located, on request of:
>
> > (1) any person who has a substantial property interest in the unsafe premises; or

> (2) any person to whom that order was issued.
>
> (b) A person requesting judicial review under this section must file a verified complaint including the findings of fact and the action taken by the hearing authority. The complaint must be filed within ten (10) days after the date when the action was taken.
>
> (c) An appeal under this section is an action de novo. . . .

The Starzenskis did not file an appeal under I.C. 36-7-9-8, despite the fact that the Hearing Authority specifically advised Sophie of her right to do so.

The law is clear in Indiana that, where a statute sets forth a specific time period for filing an appeal from an administrative decision, one must timely file the appeal in order to invoke the jurisdiction of the court. *See Claywell v. Review Bd. of the Ind. Dep't of Employment & Training Serv.* (1994), Ind., 643 N.E.2d 330; *Charles A. Beard Classroom Teachers Assoc. v. Bd. of School Trustees* (1995), Ind.App., 646 N.E.2d 988. Here, the Starzenskis filed no appeal from the order of the Hearing Authority. Instead, they seek to circumvent the statutory requirements governing appeals from the Hearing Authority by seeking an injunction against the City in a collateral proceeding brought in the Elkhart Superior Court.

The Starzenskis argue that the time for filing an appeal under I.C. 36-7-9-8 did not commence because they were never served with written notice of the Hearing Authority's action

under I.C. 36-7-9-25(a). However, we find that I.C. 36-7-9-25 applies only to notice of orders issued by an enforcement authority, and does not apply to decisions of a hearing authority.

The statute establishing the procedure through which the enforcement authority issues orders specifically requires notice under I.C. 36-7-9-25. I.C. 36-7-9-5(a), (b). The Starzenskis do not dispute the fact that the enforcement authority provided notice as required by that statute. Instead, the Starzenskis argue that, while the Hearing Authority orally notified Sophie of the contents of his action affirming the order of the Enforcement Authority at the conclusion of the October, 1992 hearing, the Hearing Authority did not provide her with written notice of his decision. The Starzenskis contend that the 10-day appeal period established in I.C. 36-7-9-8 does not commence until they are served with written notice of the Hearing Authority's action. Since they were not given written notice of the October, 1992 action, the Starzenskis conclude that the 10-day appeal period never commenced.

We disagree, Indiana Code 36-7-9-7 governs notice of actions of a hearing authority, and does not require written notice of a hearing authority's action be provided to the parties. To the contrary, I.C. 36-7-9-7(g) specifically states:

> The record of the findings made an action taken by the hearing authority at the hearing shall be available to the public upon request. *However, neither the enforcement authority nor the hearing authority is required to give any person notice of the findings and action.*

(Emphasis added). Indiana Code 36-7-9 does not require the

hearing authority to serve written notice of its decision on the parties. The Hearing Authority informed Sophie of his findings and action at the conclusion of the hearing, and specifically informed her of the 10-day appeal procedure. This satisfies the statutory requirements, and triggered the 10-day appeal period.

An appeal from the Hearing Authority's decision "must be filed within ten (10) days after the date when the action was taken." I.C. 36-7-9-8(b). Indiana Code 36-7-9-7(d) states:

> At the conclusion of any hearing at which a continuance is not granted, the hearing authority may make findings and *take action to:*
>
> *(1) affirm the order;*
>
> *(2) rescind the order; or*
>
> *(3) modify the order . . .*

(Emphasis added). Thus, the Hearing Authority took action on the Starzenskis's case at the conclusion of the October 29, 1992 hearing when it affirmed the Enforcement Authority's order. The Starzenskis failed to appeal from that action within the requisite time period. The Starzenskis have waived their challenge to the Hearing Authority's decision and the Enforcement Authority's order, and the opportunity to have the court conduct a *de novo* review of the evidence under I.C. 36-7-9-8.[10]

10. We also note that, even if the 10-day period established in I.C. 36-7-9-8 had not run when they filed for a preliminary injunction, the Starzenskis could still not challenge the order in a collateral proceeding. Their avenue of recourse would be to file a verified complaint in the Circuit or Superior Court in accordance with I.C. 36-7-9-8(b).

Nevertheless, even assuming that the Starzenskis may prosecute their collateral attack, considering the merits of their claim we find that the trial court did not err in denying their request for a preliminary injunction. The grant or denial of a preliminary injunction rests within the sound discretion of the trial court. Appellate review is limited to a determination of whether the trial court clearly abused that discretion. *Fumo v. Medical Group of Michigan City* (1992), Ind.App., 590 N.E.2d 1103, *reh'g denied, trans. denied; Steenhoven v. College Life Ins. Co. of America* (1984), Ind.App., 458 N.E.2d 661, *reh'g denied.*

DUE PROCESS

The familiar language of the Fourth Amendment to the United States Constitution establishes the right of persons to be secure in their persons, houses, papers and effects, and guards against unreasonable searches and seizures. Absent consent or exigent circumstances, a private home may not be entered to conduct a search or effect a seizure without a warrant. *See Steagald v. United States* (1981), 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38; *Payton v. New York* (1980), 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639. The Supreme Court has extended this protection against unreasonable seizures of property in the civil context. *See Soldal v. Cook County, Ill.* (1992), 506 U.S. 56, 113 S. Ct. 538, 121 L.Ed.2d 450. To this end, the Starzenskis argue that the City was required under the Fourth Amendment to obtain a warrant issued by the court in order to enter their property and remove, or "seize," debris. We do not agree.

The purpose of the warrant requirement is to install due process safeguards into the procedure through which the government searches or seizes a person's property by requiring

that an objective party weigh the interests of the government and the individual in order to determine that the entry is reasonable. *Marshall v. Barlow's, Inc.* (1978), 436 U.S. 307, 315-16, 98 S.Ct. 1816, 1822, 56 L.Ed.2d 305. In this case, the Hearing Authority considered the evidence presented by the City and the Starzenskis at a hearing and determined that the City's intrusion into the Starzenskis's property was reasonable and necessary.

The Starzenskis point to the decision of *Camara v. Municipal Court* (1967), 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930, in which the Supreme Court found that a city could not conduct a warrantless inspection of a residence for compliance with its housing code. However, in the *Marshall* decision, the Supreme Court recognized that a similar inspection could be conducted upon obtaining a "warrant *or its equivalent.*" 436 U.S. at 325, 98 S.Ct. at 1827 (emphasis added). As the Supreme Court reasoned in *Camara:*

> The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable government interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.

387 U.S. at 539, 87 S.Ct. at 1736.

The Starzenskis are not challenging a warrantless, pre-hearing inspection of their property. The Record shows that all of the evidence that the City collected regarding the violation was gathered by observing the property as it appeared in plain view

from the street. The contents and condition of the interior of the house on the property was determined from viewing debris piled up in windows, and from the report of a police officer who was summoned to the house by Sophie. Thus, rather than challenging an evidence-gathering intrusion on their property, the Starzenskis contend that the City violate their Fourth Amendment rights by entering their property under an order affirmed by the Hearing Authority after an evidentiary hearing.[11]

The United States Supreme Court discussed the requirements of due process in *Mathews v. Eldridge* (1976), 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18. Therein the Court recognized that the requirements of due process may differ in various situations, and set forth a balancing test to determine what is required under the circumstances.

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action: second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural safeguard would entail.

424 U.S. at 335, 96 S.Ct. at 903. We recognize that the

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11. Indiana Code 36-7-9-16 permits an *investigatory* inspection of a building under the authority of a warrant issued by the court.

Appendix B

Starzenskis's interest in keeping their property free from government intrusion and seizure is highly significant, as well as the fact that the City has an important interest in protecting the health and property of its citizens from nuisances created by those within the City. However, the procedure set forth in the Indiana Code, to which the City adhered in proceeding against the Starzenskis, afforded the Starzenskis considerable due process protection.

The procedure through which it was determined that the City's contemplated intrusion onto the Starzenskis's property was reasonable afforded the Starzenskis the opportunity to challenge the City's evidence and present their own evidence and arguments in rebuttal. The City provided the Starzenskis notice of the alleged violation and of the hearings it held on the matter. Further, while I.C. 36-7-9-7 only requires that the City hold one hearing on the Enforcement Authority's order, the City of Elkhart held two hearings in this matter.[12]

Upon considering the evidence, the Hearing Authority twice agreed with the Enforcement Authority that the property was in violation of the Indiana Code and City of Elkhart ordinance, and affirmed the order requiring the Starzenskis to clean up the property. The order also authorized the City to enter the property and remove the debris should the Starzenskis fail to comply, and the Starzenskis were notified of this fact. The City entered the Starzenskis property only after the Hearing Authority held a full hearing, considered the evidence and

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12. Under I.C. 36-7-95(d), the Enforcement Authority's order expires two years after notice of the order is given. Thus, at the time the second notice of violation was given on September 28, 1992, the order that was issued and affirmed in 1991 was still enforceable.

determined that the City's contemplated intrusion onto the property was justified by the reasonable government interest in protecting the health and safety of the community.

Further, we fail to see how the additional due process safeguard proposed by the Starzenskis — that the order permitting the removal of the debris be approved by the court rather than the hearing authority — would afford them any additional protection. Under the procedure set forth in the statute, the Starzenskis could have appealed the Hearing Authority's finding to the Elkhart County Circuit or Superior Court, which could then review the matter *de novo*. The court could have reviewed the evidence and determined whether the contemplated intrusion was reasonable. I.C. 36-7-9-8. However, the Starzenskis did not seek the review of the court under the statute. That the Starzenskis now claim that only a judge, and not the Enforcement Authority or the Hearing Authority, has the constitutional power to authorize the City to enter their property and remove the debris therefrom is to no avail. The Starzenskis had the opportunity to bring this matter before the court and opted not to do so.

Likewise, the Starzenskis cannot prevail on their claim that the evidence does not support the Hearing Authority's finding that their property was in violation of the law. Consideration of such an argument would require the examination and weighing of evidence. The law is clear that the court may only conduct *de novo* review when the Hearing Authority's decision is appealed under I.C. 36-7-9-8. *See* I.C. 36-7-9-8(c). The Starzenskis did not raise this contention on direct appeal, and we will not consider it now under a collateral attack.

The City's entry into the Starzenskis's property and removal

of debris therefrom was done pursuant to an order affirmed after a full adjudicatory hearing. The City's actions did not violate the Starzenskis's Due Process rights.

JUST COMPENSATION

The Starzenskis also argue that the City seized their property without compensating them, in violation of the Fifth and Fourteenth Amendments. Again, we do not agree.

The North Dakota Supreme Court addressed this issue under very similar facts in *City of Minor v. Freelander* (1988), N.D. 426 N.W.2d 556. Therein, the government demolished a person's house because it was a nuisance, due to:

> [A]n accumulation of garbage, and the presence of noxious odors caused by an accumulation of cat excrement and urine throughout the house.

Id. at 557. Rejecting the claimant's argument that the State had taken his house without just compensation required under the Fifth Amendment, the North Dakota Supreme Court reasoned:

> [I]t is well settled that the government's exercise of its police power to abate a public nuisance hazardous to the public health, safety, or welfare does not entitle the property owner to compensation.

Id. at 560 (citing *Mugler v. Kansas* (1887), 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205; *Miller v. Schoene* (1928), 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568).

Appendix B

In a recent case, the United States Supreme Court narrowed the scope of State regulation of land use by holding that a taking within the meaning of the Fifth Amendment may occur when the government acts to abate a condition on property that would not be actionable as a nuisance under the common law.

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts — by adjacent land owners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Lucas v. South Carolina Coastal Council (1992), 505 U.S. 1003, __, 112 S.Ct. 2886, 2900, 120 L.Ed.2d 798. It is well-settled in Indiana that cities and towns have the authority to regulate the use of property to protect the health and safety of their residents. As we held in *City of Gary v. Ruberto* (1976), 171 Ind.App. 1, 354 N.E.2d 786, 790: "Attempts by the Building Department to enforce building and safety codes do not amount to a taking:

> Cities and towns have power to establish reasonable regulations for the protection of lives, health and property of their citizens, and to enforce compliance with such

> regulations by fixing penalties to be imposed upon violators of the regulations. This necessarily implies the power to require the citizen to use his property as not to defeat such regulations and render them ineffective. Reasonable regulations are not unconstitutional merely because they affect the uses to which private property may be put. This is not a taking of private property. It is an exercise of the police power."

Id. 354 N.E.2d at 789 (citing *Combs v. City of New Albany* (1966), 139 Ind.App. 641, 218 N.E.2d 349; *Spitler v. Town of Munster* (1938), 214 Ind. 75, 14 L.E.2d 579). The city entered the Starzenskis's property and removed trash and debris to abate a nuisance under its police power. Such does not constitute a taking and the Starzenskis are not entitled to compensation for the removed materials.

The Starzenskis also contend that the City acted unreasonably in the manner in which it removed the debris from their property. They claim that, while in the process of removing the debris from their property, the City also threw out items that had real or sentimental value. They argue that "[m]any of Sophie's personal effects were destroyed without ever giving her an opportunity to save them." Brief of Appellant at 35.

The Record does not support their assertion. The City of Elkhart dealt with the unsanitary and hazardous condition of the Starzenskis's property since 1985. The City repeatedly asked that the Starzenskis clean the property, and in prior years had entered the property under its police power and removed debris from Sophie's yard. There is no evidence in the Record that the

Starzenskis ever acted to substantially remedy the situation themselves.

Further, Sophie was told numerous times by the City to remove the trash and debris from her property, inside and out, or the City would enter and do it for her. The first of these specific notices was given to her in 1991. Nearly two years later and faced with no other recourse, the City finally made good on its threats to enter the Starzenskis's property and remove the hazard. Even then, however, the City provided Sophie with three-days notice before it entered her property. Now, after ignoring all of the City's notices and warnings and neglecting to act for the benefit of themselves and their community, the Starzenskis complain that the City acted unreasonably by taking items that the Starzenskis wished to keep. However, we must balance the Starzenskis's interest in retaining these certain items against the City's interest in abating the nuisance the Starzenskis created.

> As is true in other circumstances, the reasonableness determination will reflect a "careful balancing of governmental and private interests. . . ." Assuming for example that the officers were *acting pursuant to a court order, and as often would be the case, a showing of unreasonableness of these facts would be a laborious task indeed.*

Soldal, 506 U.S. at __, 113 S.Ct. at 549 (citations omitted) (emphasis added).

The Starzenskis could have prevented the City from removing the selected items that they wished to retain by not allowing the property to decay into such a hazardous condition,

cleaning up the property themselves, or at a minimum sorting through the debris themselves and separating the items they wanted to retain. The Starzenskis left the City with no option but to abate the nuisance through the exercise of its constitutional police power. The City acted completely with the confines of an order of which the Starzenskis had notice and an adequate opportunity to comply. In the light of these circumstances, we cannot say that the trial court's erroneously determined that the City did not act unreasonably.[13]

Without citing to the Record, the Starzenskis claim that there is testimony and evidence that the City's workers threw valuables and money out with the rubbish, and may have kept some of Sophie's property themselves. Also without citing the Record or authority, they claim that the City failed to properly train the workers who conducted the clean up. Under our standard of review, we cannot reconsider or reweigh evidence and substitute our judgment for that of the trial court. City workers testified that they sorted through the debris in the house and separated out money and items that appeared to be of value. An inventory reflects the property the City did not discard. R. 676-77. The trial court did not abuse its discretion in denying the Starzenskis's petition for a preliminary injunction.

DELAY IN EXECUTION

The Starzenskis also argue that the City could not enforce

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13. We note, however, that in its denial of the Starzenskis's request for a preliminary injunction, the trial court provided the Starzenskis with a measure of relief by granting them an additional 60 days to remove items they wish to retain from the property before the City could complete the clean up of the property.

the Enforcement Authority's order because it was "too stale." In support of this, the Starzenskis cite I.C. 35-33-5-7(b), which generally states that a search warrant issued by a court must be executed not more than 10 days after the date of issuance. However, I.C. 35-33-5-7 is not controlling in this matter.

As noted above, the City was not executing a search warrant, but rather was executing an order to abate a nuisance issued by the Enforcement Authority and affirmed by the Hearing Authority. Indiana Code 36-7-9-5 governs the expiration of orders issued by an enforcement authority and states:

> The order expires two (2) years from the day the notice of the order is given, unless one (1) or more of the following events occurs within that two (2) year period:
>
> (1) A complaint requesting judicial review is filed under section 9 of this chapter.
>
> (2) A contract for action required by the order is let at public bid under section 11 of this chapter.
>
> (3) A civil action is filed under section 17 of this chapter.

The Enforcement Authority provided notice of its order to the Starzenskis on September 28, 1992.[14] The City executed its

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14. Sophie signed a certified receipt for the Order to Take Action on that date.

action in this matter on February 8, 1993, well within the two-year period. The order was not "stale" and was enforceable.

AFFIRMED.

SHARPNACK, C.J., concurs.

RUCKER, J., concurs in result.

APPENDIX C — JUDGMENT OF THE ELKHART SUPERIOR COURT II, STATE OF INDIANA FILED NOVEMBER 10, 1994

IN THE ELKHART SUPERIOR COURT II

CAUSE 20D029302CP107

STATE OF INDIANA

SS:

COUNTY OF ELKHART

SOPHIE STARZENSKI, KAZMER STARZENSKI & GENNIE STARZENSKI

VS.

CITY OF ELKHART, HEALTH & SANITATION COMMISSION, RICHARD MOORE, RAYMOND MINEGAR & LEROY BERRY

JUDGMENT

This action was filed by the Plaintiffs against the Defendants, requesting that the Court enjoin the Defendants from cleaning two (2) parcels of real estate owned by the Plaintiffs, pursuant to an order issued from an administrative hearing officer of the City of Elkhart. A number of issues have been raised by the parties during the trial of this litigation and much evidence, a great deal of which was unnecessary, was presented to the Court. The parties have filed extensive briefs and citations of authority supporting their respective positions.

There are two initial points from which the Court's analysis

of this action must commence. The initial question is whether or not Indiana Code annotated section 36-7-9-1, *et. Seq.*, is constitutional. The Court finds that as a matter of law the statute in question is, in fact, constitutional. The Court finds that this particular statute was a proper enactment of the police power of a municipality as permitted by the Constitution and laws of both the State of Indiana and the United States of America. Proper exercise of the police power by a municipality under this statute is, in fact, constitutional. *Gary ex. rel. Department of Redevelopment v. Roberto* (1976) 354 NE2d 786.

Indiana law is replete with administrative actions established by municipalities which enforce the police power granted to municipal corporations to provide for the general public health, safety and welfare. The Court in its review of the statute in question finds no reason to believe that the Indiana Unsafe Building Act in any way violates the general grant of police powers to a municipality if the municipality in question properly follows the legislative scheme.

The Court would further find that the Indiana Unsafe Building Act was properly adopted, as indicated by Defendants' Exhibit AA, by the City of Elkhart, as Ordinance Numbers 3446, 3648, 3787 and 3897. The Court, therefore, concludes that as a matter of law the Indiana Unsafe Building Act, as evidenced by the City of Elkhart Ordinances, is, in fact, constitutional and controls the underlying dispute in this action.

The second portion of the analysis is whether or not the City properly followed the requirements of both the Code and the Ordinance. Numerous exhibits have been presented by both parties, and a careful examination of those exhibits leads to the inescapable conclusion that the City properly followed the

statutory scheme as required. Appropriate notice was sent to the Plaintiffs in this cause, including but not limited to certified mail to last known addresses and proper publication. The Court finds that the City properly complied with the requirements of section 36-7-9-5 and later modified that order by permitting an attempt to clean up by the Plaintiff herein, as allowed by 36-7-9-6.

The Court would further find that, pursuant to the requirements of 36-7-7, a hearing was held by both administrative agencies in the City of Elkhart and by Mr. Leroy Berry, the duly appointed and confirmed hearing officer for the City. At the hearing conducted by Mr. Berry, one of the Plaintiffs in this cause appeared, presented evidence, cross-examined witnesses and argued extensively her position.

Pursuant to an agreement by the parties, the Court has reviewed the tape recordings of the hearing in question, and finds that the hearing officer made clear, concise and specific finding of facts, and, further, clearly advised the Plaintiff of her right to a review and appeal, pursuant to the requirements of section 36-7-9-8. Pursuant to that section, had the appropriate action been timely taken, this Court or any Circuit or Superior Court within the County would have had the ability to conduct a de novo action and affirm, modify or reverse the action taken by the hearing authority.

The Plaintiff, however, despite clear advisement of her appeal rights, chose not to timely contest the hearing officer's findings. Despite the final and effective order issued by the hearing officer on July 24, 1991, the City delayed taking action to enforce that order, and, in fact, despite there being no requirement for a further hearing, conducted an additional hearing on October 21, 1992. Once again, at this hearing, one of

the Plaintiffs appeared, presented evidence, cross-examined various witnesses and received an adverse decision. At this hearing, the hearing officer once again properly advised the Plaintiff of the contents of the order and of her appeal rights.

Once again, as before, the Plaintiff chose not to proceed under the law. Approximately three (3) months after the issuance of Mr. Berry's order, orally stated to all parties, a written copy was delivered to one of the Plaintiffs and the Defendants. Subsequent thereto, the City commenced a cleanup of one of the parcels of real estate in question.

The cleanup in question was conducted without the issuance of a search warrant by a magistrate. As the Court has previously indicated herein, neither the Indiana Unsafe Building Act nor case law requires the issuance of a warrant before a municipality can enforce an administrative order properly issued. Various portions of the parties' briefs have addressed the requirement for an inspection warrant as found in both case law and portions of the statute. While the arguments make for interesting reading, they entirely miss the point. The action conducted by the City of Elkhart was not an inspection, and, for the reasons previously this cause, the Court finds that no warrant was required.

During the course of cleanup, one of the Plaintiffs appeared on the scene, became somewhat abusive to City employees and generally disrupted the progress of the City's attempt to enforce the administrative order. Subsequent thereto, the Plaintiff obtained a temporary restraining order, and the cleanup was halted pending hearing in this cause.

Initially, the City argues the Plaintiffs had an adequate remedy at law, which was waived by their seeking of injunctive

relief. Plaintiffs must prove that no adequate legal remedy exists before they're entitled to injunctive relief. *Lafayette Beverage Distributors, Inc. v. Anheiser Busch, Inc.*, (1982) 545 F.Sup. 1137. Further, the Plaintiffs should be required to show that they will suffer significant injury unless an injunction issues. *Porter Memorial Hospital v. Malak* (1985) 484 NE2d 54. The Court has no question that the second requirement has been met, based upon the evidence.

If the City of Elkhart continues with its cleanup of the real estate in question, enormous amounts of personal property owned by the Plaintiffs will be removed and/or destroyed. Some of the items testified to by the Plaintiff in this cause are unique and irreplaceable, and no adequate amount of monetary damages can recompense the Plaintiffs for their destruction. The Court would further find, based upon that analysis, that no adequate remedy at law exists which would protect the Plaintiffs from the needless and/or wanton destruction of irreplaceable memorabilia. The Court would, therefore, conclude that as a matter of law that filing of a request for injunctive relief was proper, and that the Plaintiffs did not effectuate a waiver by the filing of this action.

The Plaintiffs then logically contend that Court should conduct a de novo hearing and reverse the finding of the hearing officer. The Court finds that in this contention the Plaintiffs are clearly in error. The Plaintiffs have clearly waived their right to a de novo hearing as a result of their failure to timely appeal the decision of the hearing officer. The filing of an appeal through the Circuit or Superior Court is procedural and specific time limits apply.

The Plaintiffs in this cause did not timely appeal Mr. Berry's

decision, no matter which particular date one chooses to consider the final order. At the bare minimum, an excess of 90 days elapsed after the issuance of the order and communication of appeal rights to the Plaintiffs. The statute mandates an appeal in this cause take place and be filed within ten therefore, clearly waive their right to appeal Mr. Berry's decision.

The Court, therefore, finds it is without authority to modify, repeal or remand the administrative officer's decision, which must stand unchallenged in this cause. Whether or not Mr. Berry's decision was subject to repeal or reversal may only be determined on a consideration of whether or not that particular decision was clearly illegal or violated a constitutional right. For the reasons cited above, the Court finds that all of the provisions of the Unsafe Building Act having been met, that the decision must stand unaltered.

The Court could, having found the order issued by the hearing officer to have not been properly appealed and to be valid, make no further comment on this cause. However, in light of the volatile nature of these proceedings, the Court feels compelled to comment on the procedure exercised by the Defendants in this cause, and to make certain requirements prior to the cleanup, which the Court finds to be authorized by Mr. Berry's order.

This case is replete with a litany of efforts by the City of Elkhart, over a period of approximately thirteen (13) years to force the Plaintiffs in this cause to clean up property determined to be substandard. The Court both congratulates and criticizes the City for its patience in this matter. While the City is to be commended for extending to the property owner every reasonable delay to clean the parcel in question, it would appear

that the City in delaying enforcement of cleanup orders issued with respect to this property over the years, contributed greatly to the present controversy.

It is not unreasonable that the Plaintiff's believed that the City, based upon past practice, would take no affirmative action to enforce valid orders in its possession. The Court can only empathize with the Plaintiffs, when at least one of them discovered that the City, contrary to past practice, suddenly chose to act without clear notice of the intention to do so. The Court finds it not unreasonable to believe that Plaintiffs expected notice and a reasonable time to clean or remove items from the property prior to the City's action.

It is inconceivable to this Court that the City would not be able to locate at least one of the Plaintiffs personally to provide her with advance notice of the cleanup. It is clear from the evidence presented that the method in which the City chose to initiate the cleanup was calculated to deprive the Plaintiff of notice and the opportunity to be present during the cleanup; and, as a result of this direct effort, a confrontational situation was created.

The Court further has reviewed carefully the videotape presented by the City, with respect to the method in which the cleanup was conducted. The Court finds the actions of the City employees during the cleanup to be reprehensible. The City's own exhibit discloses crude and unnecessary comments being made for the camera by various City employees. The Court cannot help but comment on the testimony presented by various cleanup personnel, which the City, by its own exhibit, shows to be false. At least two (2), and possibly more, of the City employees testified that they carefully examined each item of

personal property before disposing of the same. The videotape presented by the City clearly shows this testimony to be false. Specifically, on the videotape two (2) of the witnesses in the front room appear to shovel items of property into a dumpster without examining the same. The Court can only believe that the same type of activity took place throughout the house.

In the same manner also, the Court is astounded to find that a number of City employees when asked the amount of time needed to clean the entire property, gave precisely and exactly the same answer. It is incomprehensible to the Court how these witnesses, without being coached, could testify to a precise estimate of time to cleanup the property. This is particularly true when various of those witnesses testified that they did not see all areas of the home. This Court is offended by the carefully calculated and contrived testimony of these witnesses, obviously given in an attempt to support their position.

Additionally, the Court notes from the testimony presented in this cause that one City employee, who testified to the alleged theft of various items of currency and personal property, was suspended subsequent to his testimony. The testimony presented was that the suspension of that employee was not related to his testimony, but was imposed because of his failure to wear an appropriate City uniform, which is required at all times. Once again, the City is hoisted by its own petard, when the videotape was examined. If all of the employees in the videotape are wearing City uniforms, the Court must comment that the City dress is eclectic at best.

Throughout the course of this litigation, it has become apparent that testimony presented by various employees of the City of Elkhart was contrived and programmed. While the

administrative order is effective, based upon the analysis presented, the Court finds that, in light of the manner in which the evidence was presented, it would be required to set certain specific and strict guidelines on the future cleanup of the real estate in question, in order to prevent activity as viewed on the videotape.

The Court, therefore, denies Plaintiffs' request for a permanent injunction for the cleanup of the two parcels of real estate in question. The Court, however, orders that prior to commencing the cleanup of the properties in question, the Defendants provide to Plaintiffs specific notice of the date of the commencement of cleanup. The Court further orders that the cleanup not be commenced until at least sixty (60) days after delivery of actual notice to the Plaintiffs in this cause.

The Plaintiffs are permitted to move those items of personal property from the parcels of real estate in question prior to the cleanup. The Court reserves the right to extend the delay of the cleanup to permit the Plaintiffs to remove those items, upon a reasonable showing that the removal could not be effectuate within the sixty (60) day period. The Court, however, indicates a delay of the cleanup will not be granted without a showing of a reasonable effort to comply with this order by the Plaintiffs.

The Court further finds that there exists no other justiciable issue before this Court and, therefore, finds this order to be a final and appealable judgment in all respects. Should the Plaintiffs choose to appeal the entry of this order, the Court would indicate to the parties that a bond would be required and that a hearing would be held on the amount of bond necessary. Judgment. Notice ordered.

Appendix C

DATED NOVEMBER 10, 1994.

s/ Stephen Platt
STEPHEN E. PLATT, JUDGE
ELKHART SUPERIOR COURT II

COPY TO: WILLIAM COHEN
PAUL EASH

APPENDIX D — INDIANA CODE 36-7-9-16

Indiana Code 36-7-9-16 Inspection warrants

Sec. 16. (a) If the owners or those in possession of a building refuse inspection, an inspection officer of the enforcement authority may obtain an inspection warrant from any court of record in the county in which the building is located in order to determine if the building is an unsafe building. The court shall issue the warrant subject to the following conditions:

> (1) The person seeking the warrant must establish that the building to be searched or inspected is to be searched or inspected as part of a legally authorized program of inspection that naturally includes the building, or that there is probable cause for believing that a condition, object, activity, or circumstance legally justifies a search or inspection of that building.
>
> (2) An affidavit establishing one (1) of the grounds described in subdivision (1) must be signed under oath or affirmation by the affiant.
>
> (3) The court must examine the affiant under oath or affirmation to verify the accuracy of the affidavit.

(b) The warrant is valid only if it:

> (1) is signed by the judge of the court and

bears the date and hour of its issuance above that signature, with a notation that the warrant is valid for only forty-eight (48) hours after its issuance;

(2) Describes (either directly or by reference to the affidavit) the building where the search or inspection is to occur so that the executor of the warrant and owner or the possessor of the building can reasonably determine what property the warrant authorizes an inspection of;

(3) indicates the conditions, objects, activities, or circumstances that the inspection is intended to check or reveal; and

(4) is attached to the affidavit required to be made in order to obtain the warrant.

(c) A warrant issued under this section is valid for only forty-eight (48) hours after its issuance, must be personally served upon the owner or possessor of the building, and must be returned within seventy-two (72) hours. *As added by Acts 1981, P.L. 309, SEC. 28.*

Supreme Court, U.S.
FILED
NOV 6 1996
CLERK

No. 96-350

In The

Supreme Court of the United States

October Term, 1996

SOPHIE STARZENSKI, KAZMER STARZENSKI, and GENNIE STARZENSKI,

Petitioners,

vs.

CITY OF ELKHART, RICHARD L. MOORE, STREET COMMISSIONER, RAYMOND H. MINEGAR, CODE ENFORCEMENT OFFICER AND PRESIDENT, LEROY BERRY, JR., CITY OF ELKHART HEARING OFFICER and HEALTH AND SANITATION COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The Indiana Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL D. EASH
Elkhart City Attorney
Counsel of Record
Attorney for Respondents
229 S. Second Street
Elkhart, IN 46516
(219) 294-5471

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RESPONDENTS' COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Petitioners' claims are barred because the Petitioners did not timely appeal the decision which they challenge in this Court.

2. Whether the Indiana Court of Appeals correctly upheld the trial court's determination that the Respondents lawfully entered the premises of the Petitioners.

3. Whether the Indiana Court of Appeals correctly upheld the trial court's determination that Respondents did not engage in an unconstitutional taking of Petitioners' property.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents, City of Elkhart, Richard L. Moore, Street Commissioner, Raymond H. Minegar, Code Enforcement Officer and President, Lee Roy Berry, Jr., City of Elkhart Hearing Officer, and Health and Sanitation Commission (collectively referred to as the "City"), by counsel, respectfully ask the Court to deny the Petition for Writ of *Certiorari* of the Petitioners, Sophie Starzenski, Kazmer Starzenski, and Gennie Starzenski (collectively referred to as the "Starzenskis").

COUNTERSTATEMENT OF THE CASE

A. Procedural History.

The Starzenskis appealed the trial court's order denying Starzenskis' request for a preliminary injunction against the City to the Court of Appeals of Indiana. On November 27, 1995, the Indiana Court of Appeals heard oral argument in this matter. On January 10, 1996, the Indiana Court of Appeals issued its decision affirming the trial court's denial of the preliminary injunction. The decision of the Indiana Court of Appeals is reported as *Starzenski v. City of Elkhart, et al.*, 659 N.E.2d 1132 (Ind. App. 1996). On February 7, 1996, Starzenski filed a Petition to Transfer to the Indiana Supreme Court. On May 31, 1996, the Indiana Supreme Court denied that Petition. On August 29, 1996, the Starzenskis filed their Petition for Writ of *Certiorari* to this Court.

B. Statement of the Facts.

The Starzenskis' Statement of the Case curiously omits the vast majority of facts relied upon by the Indiana Court of Appeals in reaching its decision. The complete set of facts relied upon by that Court are as follows. *See Starzenski v. City of Elkhart, et al.*, 659 N.E.2d 1132, 1134-36 (Ind. App. 1996).

Sophie, Kazmer, and Gennie Starzenski own real estate located at 1015 West Garfield in Elkhart, Indiana. Sophie described herself in her brief to the Court of Appeals as a "bag lady" who resides in Elkhart.[1] Kazmer and Gennie do not live in Elkhart.[2]

In 1991, the Building Commissioner and Enforcement Authority (hereinafter, "Enforcement Authority")[3] of the

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[1] There is a house on the property at 1015 West Garfield, although the City and the Starzenskis dispute how the property is used. At the oral arguments before the trial and appellate courts, Sophie claimed that she lived in the house at that location as her primary residence. The City, however, disputed this contention and pointed to the fact that there has been no water or gas service to the house for many years. For the purposes of its decision, the Indiana Court of Appeals presumed that this house was Sophie's home.

[2] Throughout the proceedings before the Building Commissioner and Enforcement Authority of the City of Elkhart, Sophie and the City could only identify the last known address of Kazmer as being in Antarctica, and the address of Gennie as being in New York. It was not until this matter was brought before the Elkhart Superior Court that Kazmer and Gennie informed the City that their current address is in Sequim, Washington.

[3] Indiana Code 36-7-9-2 defines "enforcement authority" as the chief administrative officer of the department authorized by

City of Elkhart determined that the Starzenskis' property was in violation of I.C. 36-7-9-1, *et seq.*, and City of Elkhart Ordinance No. 3897, due to a large accumulation of trash and debris on the premises. The Enforcement Authority ordered that the property be cleaned,[4] and a hearing on the matter was set for July 24, 1991.[5] In accordance with I.C. 36-7-9-25, notice of the hearing was sent to, and received by, Sophie at the 1015 West Garfield address. Notices also were sent to Kazmer and Gennie at their Antarctica and New York addresses, but the notices were returned undelivered. Notice was also published in the local newspaper, *The Elkhart Truth*. Sophie appeared at the hearing.

At the July 24, 1991 hearing, the City offered photographs and testimony concerning the condition of the property. At the conclusion of the hearing, the Hearing Authority[6] determined that the property was in substantial violation of the building code, was unsafe, unclean and constituted a nuisance. The Hearing Authority affirmed the Enforcement Authority's order, and sent a written "order" to Sophie instructing the Starzenskis to

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ordinance to administer I.C. 36-7-9, *et seq.*, which governs the enforcement of building standards.

[4] Indiana Code 36-7-9-5(a)(4) authorizes the Enforcement Authority to issue an order requiring "removal of trash, debris, or fire hazardous material in and about the unsafe premises."

[5] Indiana Code 36-7-9-7, with unrelated exceptions, requires a hearing be held relative to each order of the Enforcement Authority.

[6] Indiana Code 36-7-9-2 defines "hearing authority" as a person or persons designated as such by the executive of a city or county, or by the legislative body of a town.

remove "junk and debris" from the property within 30 days, after which time the City was authorized to enter the property and take the required action. A copy of this Findings of Fact and Action Taken is attached as Appendix A.

The 30-day time period came and went without the Starzenskis taking any substantial action to ameliorate the problem. By September, 1992, the Starzenskis had not complied with the order, and in fact additional debris had collected on the property. At that time, the exterior of the property was filled with trash, debris, and flammable materials. As visible through windows and doors, the house was "jam packed" with debris and garbage.

The Enforcement Authority again determined that the house and premises were unsafe, and on September 23, 1992 executed a "Notice – Order to Take Action." A copy of this Order to Take Action is attached as Appendix B. The Order to Take Action was sent to Sophie, who signed a return receipt upon receiving it. Notices of the Order to Take Action were also sent to Kazmer and Gennie, but were returned undelivered. The City also published the Order to Take Action in the local newspaper. The Order to Take Action required the removal of trash from the entire premises within 10 days, and stated:

> If you do not comply with this order, the City of Elkhart, through its Building Department, may enter the premises and carry out the action required by the order and charge you for the costs of said clean up.

Notice of a hearing was sent to, and received by, Sophie. Again, notices were sent to Kazmer and Gennie but were

returned undelivered. The second hearing was held October 29, 1992.

Sophie appeared at the second hearing, offered evidence, cross-examined witnesses, and presented argument. Inspectors testified and offered photographs of the property, describing the premises, inside and out, as containing a large amount of debris and trash.[7] Also offered into evidence was a September 24, 1992, police report, completed when Sophie reported that the house had been burglarized, in which the investigating officer stated that there was no way to enter the house due to piles of materials stacked to the ceiling. The police officer reported that "[t]he residence was jammed full, [including] the basement of everything imaginable. . . . "[8]

The Hearing Authority again found that the residence was a nuisance, and again affirmed the order of the Enforcement Authority that "substantial stuff and things"[9] be removed from the premises. The Hearing Authority specifically instructed Sophie to bring the property into compliance within 15 days, after which the

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[7] There is no evidence that inspectors actually entered the residence on the property. The Record shows that the inspectors determined that the house on the property was packed with debris from seeing trash piled up in the windows.

[8] The police officer did not enter the residence, as the door was blocked by debris. The police report reflected that Sophie had to enter the house by crawling through a window to see if anything had been stolen.

[9] Evidently, the Hearing Authority chose to refer to the debris within and about the house as "substantial stuff and things" because Sophie objected to the characterization of the material in her house as being trash.

City was authorized to enter the property, inside and out, and take the necessary action. The Hearing Authority also expressly notified Sophie of her right to appeal to the Circuit or Superior Court, and told her that she must appeal his decision within 10 days. *The Starzenskis did not appeal.*

Again, the Starzenskis did not comply with the Order within the time allotted. The City sent notice of its intent to enter and clean the property to Sophie at the 1015 Garfield address on February 4, 1993. Sophie received this notice on February 5. The City entered the property on February 8, 1993, to remove debris and clean. The City found the yard, house, shed and garage packed with trash. The house was filled with debris, in some places five feet deep, which completely covered the floor. The basement also was packed with trash, at some points as high as the ceiling.

The City's workers separated and removed the trash, while items that appeared to be of value were retained in areas of the house that the workers had cleared away. These items remained in Sophie's possession. The debris removed from the residence filled eight dump trucks and was taken to a landfill.

While the City's workers cleared the debris, the Starzenskis' attorney petitioned for, and was awarded, a temporary restraining order that stopped the trash removal. The temporary restraining order was presented to the City's workers and prevented the workers from clearing the refuse from the Starzenskis' basement. In later seeking a preliminary injunction, the Starzenskis argued that the City violated their Due Process rights by entering

their property without a warrant, and that the City had taken their possessions without just compensation. After a hearing, the trial court denied their request for a preliminary injunction, finding that the City's actions did not violate the Constitution.

REASONS FOR DENYING PETITION

In their Petition for Writ of *Certiorari* (the "Petition"), the Starzenskis assert that the City (a) violated the Fourth Amendment to the U.S. Constitution by unreasonably seizing the Starzenskis' property and (b) violated the Fifth and Fourteenth Amendment by disregarding the Due Process requirements of notice and a predeprivation hearing. Additionally, though they present no substantive "takings" argument in their Petition, the Starzenskis also apparently argue that the City engaged in an unconstitutional taking of the Starzenskis' property. *See* "Questions Presented" section of the Petition. In fact, the Indiana Court of Appeals correctly determined that the City's actions were constitutional in all respects. Furthermore, the Starzenskis are barred from pursuing this claim for a non-constitutional reason, *i.e.* they failed to comply with the applicable limitations periods for appeal of the City's actions.

I. NON-CONSTITUTIONAL GROUNDS TO DENY PETITION FOR WRIT OF *CERTIORARI*.

The Indiana Court of Appeals held that, because the Starzenskis failed to appeal the administrative hearing officer's decision within the statutory time limits, the

Starzenskis waived their challenge to the Hearing Authority's decision and Enforcement Authority's order, and the opportunity to have the court conduct a *de novo* review of the evidence under I.C. § 36-7-9-8. *Starzenski v. City of Elkhart, et al.*, 659 N.E.2d 1132, 1137 (Ind. App. 1996). The Starzenskis have not challenged this holding on appeal. Therefore, even assuming that the Starzenskis were correct in their assertion that the City acted unconstitutionally (an assertion that the City heartily denies), they still would be barred from pursuing this appeal because they failed to appeal the decision of the Hearing Authority in a timely manner.

II. ALLEGATIONS OF FOURTH AMENDMENT/DUE PROCESS VIOLATIONS.

The Starzenskis present their Fourth Amendment concerns as follows:

> "Whether the minimum constitutional requirements for a search and seizure of personal property in a private home were met when the Respondent, City of Elkhart, entered the Petitioner's home to abate a nuisance without a judicial warrant but pursuant to an administrative order."

Though it is not entirely clear from the Petition, the Starzenskis apparently contend that the City's search and seizure of their property was unreasonable under the Fourth Amendment because the City did not give the Starzenskis adequate due process under the Fifth and Fourteenth Amendments. *See* Petition, page 7. The Starzenskis cite two occurrences of inadequate due process. First, they argue that the City's entry onto their premises

was unreasonable because the due process was inadequate. Second, they argue that they were entitled to a predeprivation hearing prior to the disposal of some of the junk and trash in the premises. Finally, the Starzenskis argue that there is a "conflict among the states" in this area of due process jurisprudence. The City will address each allegation in turn.

(a) Entry Onto Premises.

Since the City could clearly have entered Starzenskis' property if it had a judicial warrant (*see, e.g., Michigan v. Tyler*, 436 U.S. 499 (1978)), the question becomes whether there is a constitutional distinction between the administrative order authorizing entry onto Starzenskis' private property vis-a-vis a judicial order authorizing that same entry. In the circumstances present here, Supreme Court case law and lower court decisions clearly indicate that no such distinction exists.

An illegal search within the meaning of the Fourth Amendment occurs whenever one's reasonable expectation of privacy is violated by unreasonable governmental intrusion. *Katz v. United States*, 389 U.S. 347, 353 (1967). The "basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against *arbitrary* invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (emphasis added).

The City's entry onto the Starzenskis' property was neither unreasonable nor arbitrary. The Starzenskis, or any other reasonable person, had to have seen it coming.

The City had consistently notified the Starzenskis of the problem from 1985 until the date of entry, conducted two hearings on the matter, and provided the Starzenskis with formal notice on two separate occasions prior to taking any action. Regardless of what the Starzenskis' subjective expectations may have been at that point, no reasonable privacy interests can be said to have remained. *See Michigan v. Clifford*, 464 U.S. 287, 292 (1984) ("The test essentially is an objective one"). To retain privacy interests, the Starzenskis were required to take nominal precautions to preserve their privacy. *See, Rawlings v. Kentucky*, 448 U.S. 98 (1980). Here, the Starzenskis chose not to take these normal precautions.

The Starzenskis' Petition seems to imply that a judicial warrant is required whenever an entry is made to abate an established nuisance irrespective of the underlying circumstances. For at least three reasons, this position is invalid.

First, under the exercise of its police power, the City had the power to establish reasonable regulations for the protection of the lives, health, and property of their citizens and to enforce compliance with such regulations by fixing penalties to be imposed upon violations. *Spitler v. Town of Munster*, 214 Ind. 75, 14 N.E.2d 579 (Ind. 1938).

Second, requiring judicial authorization of an abatement determination "would impose untoward burdens upon local governments as well as the courts." *See Shadwick v. City of Tampa*, 407 U.S. 345, 353 (1972) ("Communities may have sound reasons for delegating the responsibility of issuing warrants to competent personnel other than judges or lawyers").

Third, in the Fourth Amendment context, the purpose of review by a "judicial officer" prior to issuance of a warrant is to "insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause." *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963). There is nothing in the record or in the Court of Appeals' decision to suggest that the hearing authority was anything but competent, impartial, neutral, and detached.

The hearings before the hearing authority most assuredly constituted an adequate buffer between the municipal employees and the Starzenskis. Clearly, due process does not require a judicial tribunal; all that is required is notice and an opportunity to be heard. *Schweiker v. McClure*, 456 U.S. 188 (1982); *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). For all practical purposes, the conclusion that a nuisance existed in violation of municipal law, and was therefore subject to abatement pursuant to the governmental power of the municipality, was "judicially" determined by the hearing officer. Moreover, an application for a search warrant is *ex parte*. The subject is never asked for his side of the story. In this sense, the Starzenskis enjoyed an opportunity not available to the usual "suspect." *See Conner v. City of Santa Ana*, 897 F.2d 1487, 1497 (9th Cir. 1990) (Trott, C.J. dissenting), *cert. denied*, 498 U.S. 816 (1990).

(b) Removal of Junk and Trash.

The Starzenskis' due process argument relating to the alleged seizure of their property is very limited. On this point, the Starzenskis do not assert that the City violated their due process rights by ordering the property cleaned up. Instead, the Starzenskis assert that they were "entitled to a predeprivation hearing concerning what items should be seized." Petition, pages 14-15.

In fact, the Starzenskis were given more than six years of Due Process and notice. The City's position is well-stated by the Indiana Court of Appeals:

> The Record does not support [the Starzenskis' assertion that their due process rights were violated]. The City of Elkhart dealt with the unsanitary and hazardous condition of the Starzenskis' property since 1985. The City repeatedly asked that the Starzenskis clean the property, and in prior years had entered the property under its police power and removed debris from Sophie's yard. There is no evidence in the Record that the Starzenskis ever acted to substantially remedy the situation themselves.
>
> Further, Sophie was told numerous times by the City to remove the trash and debris from her property, inside and out, or the City would enter and do it for her. The first of these specific notices was given to her in 1991. Nearly two years later and faced with no other recourse, the City finally made good on its threats to enter the Starzenskis' property and remove the hazard. Even then, however, the City provided Sophie with three-days notice before it entered her property. Now, after ignoring all of the City's

notices and warnings and neglecting to act for the benefit of themselves and their community, the Starzenskis complain that the City acted unreasonably by taking items that the Starzenskis wished to keep. However, we must balance the Starzenskis' interest in retaining these certain items against the City's interest in abating the nuisance the Starzenskis created.

> As is true in other circumstances, the reasonableness determination will reflect a "careful balancing of governmental and private interests. . . . " Assuming for example that the officers were *acting pursuant to a court order, and as often would be the case, a showing of unreasonableness on these facts would be a laborious task indeed.*

Soldol [*v. Cook County, Illinois,* 506 U.S. 56, 71 (1992)] (citations omitted) (emphasis added).

The Starzenskis could have prevented the City from removing the selected items that they wished to retain by not allowing the property to decay into such a hazardous condition, cleaning up the property themselves, or at a minimum sorting through the debris themselves and separating the items they wanted to retain. The Starzenskis left the City with no option but to abate the nuisance through the exercise of its constitutional police power. The City acted completely within the confines of an order of which the Starzenskis had notice and an adequate opportunity to comply. In the light of these circumstances, we cannot say that the trial court

> erroneously determined that the City did not act unreasonably.[10]
>
> Without citing to the Record, the Starzenskis claim that there is testimony and evidence that the City's workers threw valuables and money out with the rubbish, and may have kept some of Sophie's property themselves. Also without citing the Record or authority, they claim that the City failed to properly train the workers who conducted the clean up. Under our standard of review, we cannot reconsider or reweigh evidence and substitute our judgment for that of the trial court. City workers testified that they sorted through the debris in the house and separated out money and items that appeared to be of value. An inventory reflects the property the City did not discard. . . . The trial court did not abuse its discretion in denying the Starzenskis' petition for a preliminary injunction.

Starzenski v. City of Elkhart, et al., 659 N.E.2d at 1140-41.

(c) Alleged "Conflict Among the States".

To shore up their Fourth Amendment argument, the Starzenskis assert that there is a conflict among the states as to how government authorities may proceed to abate public nuisances under the Fourth Amendment. Petition, pages 10-11. To bolster this position, the Starzenskis cite

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[10] We [i.e. the Indiana Court of Appeals] note, however, that in its denial of the Starzenskis' request for a preliminary injunction, the trial court provided the Starzenskis with a measure of relief by granting them an additional 60 days to remove items they wish to retain from the property before the City could complete the clean up of the property.

five cases. Out of these five cases, three have nothing whatsoever to do with the Starzenskis' Fourth Amendment question.[11]

The remaining two cases, *Conner v. City of Santa Ana*, 897 F.2d 1487 (9th Cir. 1990), *cert. denied*, 498 U.S. 816 (1990), and *Hroch v. Omaha*, 4 F.3d 693 (8th Cir. 1993), reveal no conflict among the states. Instead, these two decisions hinge on the presence or absence of judicial oversight. In both *Hroch* and the present case (but not in *Conner*), the complainant petitioned for state court review of the order to enter the premises and sought a temporary restraining order to prevent such action. *Hroch*, 4 F.3d at 696-97. In both *Hroch* and the present case, the state court denied the requested injunction. *Id.* In *Hroch*, as here, the complainant's argument that there was a Fourth Amendment violation simply ignored the question of whether this judicial oversight of the actions which are alleged to violate the Fourth Amendment provide a "constitutionally adequate substitute for a warrant." *Id. Conner*, the primary case relied upon by the Starzenskis, simply does not deal with this issue of "judicial oversight".

The City is unaware of any case that has invalidated any administrative decision where there was judicial oversight such as that present here. Furthermore, the City is unaware of any case, state or federal, that invalidated an administrative officer's decision on due process

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[11] In *City of Cedar Falls v. Flett*, 330 N.W.2d 251 (Iowa 1983) and *Carson v. State*, 144 S.E.2d 384 (Ga. 1965), the police officer who entered the premises obtained a judicial warrant. *State Ex Rel. Miller v. Anthony*, 647 N.E.2d 1368 (Ohio 1995) did not even address the Fourth Amendment.

grounds where, as here, the Petitioner's had the right to appeal the administrative officer's decision to a judge and chose not to do so.

III. THE "TAKINGS" ARGUMENT.

Though the Starzenskis allege that the City engaged in an unconstitutional taking when it disposed of the junk, trash, and debris on the Starzenskis' property (*See* Question 2 of Petition's Questions Presented section), they provide no argument or citation to support this position. For its part, the City agrees with the Indiana Court of Appeals' reasoning that the government's exercise of its police power to abate a public nuisance hazardous to the public health, safety, or welfare does not entitle the property owner to compensation, and, in any case, that the Starzenskis were given ample opportunity to avoid any loss whatsoever. *Starzenski v. City of Elkhart, et al.*, 659 N.E.2d 1132 (Ind. App. 1996).

CONCLUSION

The Starzenskis failed to timely appeal the Administrative Hearing Officer's decision. Therefore, for completely non-constitutional reasons, the Starzenskis are barred from pursuing this claim. Even if they had timely filed their constitutional objections, however, those claims would still have no force. The City granted the Starzenskis much more due process than is constitutionally required. Far from engaging in unreasonable search and seizure, the City acted very reasonably when

it cleaned up the Starzenskis' premises. For the foregoing reasons, the Court should deny the Petition for Writ of *Certiorari*.

Respectfully submitted,

PAUL D. EASH
Elkhart City Attorney
Counsel of Record
Attorney for Respondents
229 S. Second Street
Elkhart, IN 46516
(219) 294-5471

APPENDIX A – FINDINGS OF FACT DATED JULY 24, 1991

STATE OF INDIANA)
) SS:
ELKHART COUNTY)

DIVISION OF CODE ENFORCEMENT

CITY OF ELKHART, INDIANA

CASE NO. 2-11-07-91

CITY OF ELKHART,
Petitioner.

vs.

FRANK STARZENSKI,
PAULINE STARZENSKI,
SOPHIE STARZENSKI,
GENNIE STARZENSKI,
KAZMER STARZENSKI,
Respondents.

FINDINGS OF FACT AND ACTION TAKEN

Hearing on the 11th day of July, 1991.

This matter having been set for hearing on this date, the Petitioner, City of Elkhart, now appears by the Director of the Building Department, Leroy Robinson, and the following respondents [sic] appear: Sophie Starzenski.

Service of Notice of a June 26, 1991, Hearing on the Enforcement Authority's original Order of Condemnation, dated April 25, 1991, on all the Respondents named above by certified mail was attempted by the Petitioner on May 6, 1991, but records indicate that only one of the Respondents, Sophie Starzenski, actually received notice. The Petitioner did, however, give notice by publication to

all Respondents on May 10, 1991 of the June 26, 1991 hearing. That hearing was apparently continued until today's date, but there is no evidence of any notice of that continuance. Respondent Sophie Starzenski was apparently given notice because she appeared at the hearing. Thus the required notice to all Respondent parties was not given.

Hearing on said Order to Comply is now held and the Hearing Officer being duly advised, NOW FINDS as follows:

1. The legal description of the premises herein is as follows: 44 feet W side Lot 93 Woif's Addition to the City of Elkhart, Indiana, in the City of Elkhart, Elkhart County, Indiana, and commonly known as: 1015 West Garfield.

2. The above described premises is owned by: Sophie Starzenski, Frank Starzenski, Pauline Starzenski, Gennie Starzenski and Kazmer Starzenski and no other persons or entities have an interest therein.

3. Evidence was given by both Petitioner and Sophie Starzenski, the sole respondent to appear. On the basis of that evidence the Hearing Officer makes the following findings:

a) The subject property suffers from substantial physical damage on the roof, and the porch. A part of the over hang [sic] of the front portion of the roof is missing.

b) The outside of the premises is unkempt and cluttered with items which appear from the evidence to be junk as of May 28, 1991 and still exist as of the time of this hearing.

c) It is unclear whether the inside of the premises is in basically the same condition as the outside, but there is a likelihood that it is in a similar state.

d) The present state of the premises presents an appearance which is offensive to the eye and presents an attraction to others, especially the young and inquisitive. There is a possibility that such persons could be injured after going onto the premises.

e) There is no fence or other obstruction surrounding the property which prevents passersby from going onto the premises.

4. The Hearing Officer therefore concludes that the subject premises is in substantial violation of the building code of the City of Elkhart in that it is unsafe and unclean and constitutes a nuisance; it is also in violation of the Code by virtue of the physical damage to the roof and porch. To the extent that the original notice of April 25, 1991 alleged such violations, those allegations are found to be true. It is not clear, however, that the entire house on the premises is as unsound as the original notice alleges.

5. Since the inside of the premises may be in a like condition as the outside, the City by virtue of its police power, has the right to inspect the inside of the house on the property pursuant to law (I.C. 36-7-9-16) and after such inspection present such additional evidence as it thinks proper in further hearings in this cause.

6. For now, it is the decision of the Hearing Officer that the Respondent, Sophie Starzenski, is given thirty (30) days beginning July 25, 1991, at 8:00 o'clock a.m. in

which to repair the damage to the porch and roof and remove the junk and things from the premises which currently constitutes a nuisance. If she has not done so by that time, the Petitioner may enter the premises and take the required action and tax the owners for costs.

7. This cause is subject to further hearing pending further inspection of the premises by Petitioner after having secured an inspection warrant pursuant to I.C. 36-7-9-16. Notice to *all* parties must be made upon them or their agents by certified mail, return receipt requested, or by any other statutorily acceptable means before such hearing can go forward, however.

DATED: 7-24-91 /s/ Lee Roy Berry, Jr.
Lee Roy Berry, Jr.
Hearing Officer
Division of Code Enforcement
City of Elkhart, Indiana

APPENDIX B – ORDER TO TAKE ACTION DATED SEPTEMBER 23, 1992

CITY OF ELKHART (SEAL)

ELKHART, INDIANA 46516 • MUNICIPAL BUILDING, 229 SO. SECOND STREET • (219) 294-5471

FAX (219) 293-7964 **JAMES P. PERRON, Mayor**
CITY ACCESS 522-2377

NOTICE

ORDER TO TAKE ACTION

TO: Each and all of the persons, firms, or corporations hereinafter listed, together with any and all unknown owners, land contract holders, lien holders or mortgagees of the following described real estate located in Elkhart County, Indiana, their unknown heirs, executors, administrators, agents or assigns, and any and all persons, firms or corporations having or claiming any titles, rights or interests therein.

TO: SOPHIE STARZENSKI, FRANK STARZENSKI, PAULINE STARZENSKI, GENNIE STARZENSKI AND KAZMER STARZENSKI

RE: 1015 West Garfield Avenue, Elkhart, Indiana 46516
Also known as 44' West Side of Lot 93
WOLFS Addition to the City of Elkhart, Indiana
AND
1905 Fieldhouse, Elkhart, Indiana 46517
Also known as West Side of Lot 101 Fieldhouse Addition to the City of Elkhart, Indiana.

You and each of you are hereby notified that, effective this date, the posted building or buildings located on

the above real estate are declared unfit and unsafe for any use whatsoever in its or their current condition and constitute a nuisance and danger to the health, safety, and general welfare of the community, pursuant to Indiana Code, sections 36-7-9-4 and 36-7-9-5(4) and are in violation of Elkhart City Ordinance No. 3446 and Amendment 3787 which reads in part: that it shall be unlawful to allow the accumulation of, on any premises not approved for dumping of refuse, nuisances, including, but not limited to, garbage, ashes, refuse, rubbish, manure, offal, carcasses, junk, automobile parts and bodies, tires, junked appliances, bedding, junked furniture, clippings from growth, old newspaper, and all other kinds and types of organic or inorganic material gernally [sic] classified as junk or refuse.

IT IS HEREBY ORDERED that:

THE TRASH, DEBRIS, REFUSE, JUNK AND FIRE HAZARDOUS MATERIAL IN AND ABOUT THE UNSAFE PREMISES BE REMOVED. The exact terms and conditions of this Order may be obtained from the Building Commissioner.

You are hereby given *TEN (10) days* in which to take the required action beginning with the date of receipt of this Order.

This Order shall become final within ten (10) days after you receive notice of this Order unless you or someone holding a fee interest, life estate interest or equitable interest or their legal representative *request a hearing in writing* and that request is delivered to the Elkhart City Building Department before the end of the ten day period.

If you do not comply with this Order, the City of Elkhart, through its Building Department, may enter the premises and carry out the action required by the Order and charge you for the costs of said clean-up.

If you plan to transfer a substantial interest in the above-named property, Indiana Law requires that you tell the person or persons to whom you plan to transfer that substantial property interest about the existence and contents of this order before transferring or agreeing to transfer a substantial interest in the above-named property. You must also supply the Building Commissioner with written copies of that person or those person's full name(s), address(es) and telephone number(s) and copies of the legal instrument(s) under which you transferred or agreed to transfer that substantial property interest.

Dated at Elkhart, Indiana this 23rd day of SEPTEMBER 1992.

By /s/ Leroy Robinson
LEROY ROBINSON, Building Commissioner, City of Elkhart,
229 S. Second Street
Elkhart, Indiana 46516
(219) 294-5471